Further Notice,

> "[One] school[] of thought concerning the relationship between ownership and diversity .... holds that the more independently owned outlets there are, the greater the viewpoint diversity. This is the '51 stations provides more diversity than 50' approach.... A second school of thought concerning diversity posits that the greater the concentration of ownership, the greater the opportunity for diversity of content. Under this view ... where one party owned all the stations in a market its strategy would likely be to put on a sufficiently varied programming menu in each time slot to appeal to all substantial interests. While this model may, indeed, promote diversity of entertainment formats and programs, we question whether it would act similarly with regard to news and public affairs programming...."[30]

While it is highly unlikely that the antitrust laws would permit a single entity to own all the broadcast stations in a given market, CBS nonetheless submits that it is the second model which most closely approximates reality -- not only as to entertainment programming, but with respect to news and public affairs broadcasts as well.

The belief that diversification of ownership is a necessary precondition to content diversity rests on the assumption that the owner of multiple outlets will cause each of those outlets to present information, viewpoints and entertainment in a manner which reflects, in some broad sense, the owner's own political and artistic philosophy. Even if this assumption were true, the diversity of outlet ownership in the intellectual markets in which broadcast television stations operate is too broad to justify governmental intervention. But because it is far from true that owners generally cause their media outlets to echo their own political and artistic philosophies, the actual scope of content diversity in the intellectual markets in which television stations compete is significantly greater than the extent of ownership diversity in those markets would indicate.

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[30] Further Notice at ¶ 63 (footnotes omitted).

Economic self-interest compels a group owner to permit each outlet to achieve its own political and artistic sensibility, and, for those outlets intended to achieve mass circulation, to assure that each outlet reflects the full range of newsworthy viewpoints encompassing public debate in its service area. CBS's experience as a group owner of broadcast stations has, we believe, been typical. This company has long endeavored to develop each of its owned stations as a distinctive outlet uniquely targeted to the audience-service opportunities present in its market. Like ABC, NBC and Westinghouse, CBS aims to make each station an organ of mass appeal: one that addresses a wide range of views and tastes within its particular geographic market. The General Managers of the CBS Owned television and radio stations therefore have wide latitude to determine what is most responsive to the needs of their individual markets, while covering the spectrum of viewpoints that must be covered to offer viewers and listeners a credible news and public affairs service. This is not simply a matter of principle or corporate culture. A contrary strategy which sought to impose either interstation or intrastation uniformity of viewpoint would, we believe, be doomed to commercial failure.

Media operators are in the business of supplying material that meets the public's demand for information and entertainment. Traditional arguments for governmental intervention presuppose that these operators are in a position to disseminate to the public only material that the operator wishes the public to have -- material which the operator may think is good for the public, or, more ominously, good for the operator himself. In this view of the communications industry, audiences come to media as empty vessels. It is doubtful that this scenario is true for people anywhere; it is certainly not true for Americans.[31] Audiences in the United States bring to their media experiences strong convictions and tastes, and success as a media operator requires that one offer material that the public is interested in receiving. And as media outlets proliferate, the communications business has become an increasingly intense competition to locate niches of taste and conviction, and to address them in a compelling way.

Experience demonstrates that although two owners of cable systems may come to the business with very different personal outlooks, as gatekeepers in the intellectual marketplace they will behave similarly, reflecting the economic experience that a cable system must offer a specific variety of services to all subscribers if it hopes to attract any. It is thus not surprising that most of America's 11,351 cable systems[32] owned by 482 MSOs,[33] offer much the same assortment of national cable networks -- all-news, public affairs, sports, movies, music videos, etc. -- with the primary variable being the number of channels available to program. We are aware of few cable systems in the United States that do not offer subscribers MTV. Could this possibly be because the personal philosophy of every cable owner is reflected in MTV?

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[31] Quoting Professor Jaffe in a different context, Justice Douglas observed that

> "The implication that the people of this country -- except the proponents of the theory -- are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public."

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 152 n.3 (1973) (Douglas, J. concurring) (quoting Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 786-87 (1972)).

[32] Television & Cable Factbook No. 63 -- Cable Systems 1995, p. ix.

[33] Broadcasting & Cable Yearbook 1995, Vol. 1, pp. D3-D57.

For the most part, media operators in the United States are corporate entities seeking to maximize profits by identifying and serving the needs of audiences. If there was ever a time in the country's past when a few media owners were in a position to impress their own political and artistic visions on the consciousness of a gullible public, which we very much doubt, that time has assuredly passed. The age of broadcasting, to say nothing of the Information Superhighway, is also the age of a well-educated public that makes its own choices from a vast menu of possibilities. In this environment, it is simply not possible for media operators to manipulate public access to information.

It is, moreover, in the direct economic interest of large media companies to present material that speaks to a wide range of audiences. Examples thus abound of the striking contrast in political and artistic orientations of co-owned media outlets. During a period of several years, for instance, the daily newspaper generally regarded as having New York's most conservative editorial page, the New York Post, was commonly owned with the Village Voice, the city's prominent left-of-center weekly. By the same token, Capital Cities/ABC operates a highly respected network news organization which, along with those of CBS and NBC, is regularly vilified by conservative critics for its alleged "liberal bias"; that same company operates a "talk"-oriented radio network and AM radio station group that both prominently feature hosts such as Rush Limbaugh and Bob Grant, regularly denounced by liberals for their bare-knuckles conservatism. In reality, of course, Capital Cities/ABC is neither liberal nor conservative, but is in the business of covering a wide range of viewpoints for numerous audiences. Similarly, Time Warner, the company that publishes Fortune, Martha Stewart Living and Southern Living magazines, also releases "gangsta rap" albums. Viacom, another media conglomerate, distributes

1950's situation comedies such as "I Love Lucy" and "Our Miss Brooks"; it also distributes MTV. What Time Warner and Viacom "believe in," we submit, are the values of neither Fortune nor gangsta rap nor "Our Miss Brooks" nor MTV, but the value of serving as many different audiences as they possibly can, each to the best of the company's ability.[34]

A similar economic impetus toward viewpoint diversity may also exist within a single outlet. The coverage range that a particular outlet will endeavor to achieve is generally a function of its circulation strategy, and the broader the circulation it seeks, the wider its range of viewpoints must be. For this reason, daily newspapers, and the news and public affairs programs of a broadcast station, typically cover a spectrum of opinions, whatever the particular editorial bent of the owner. Even daily newspapers that constitute the sole daily print "voice" in their respective markets are typically forums of robust debate, as they must be in order to win broad readership.

Governmental interference in the structure of media ownership simply cannot be justified on grounds that group ownership is equivalent to diminished content diversity, because no such equivalence exists.

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[34] Ironically, a frequent media-related criticism of our time is the perceived *failure* of large media organizations to impose their own viewpoints and cultural norms on the content of the various media products they issue. Such critics decry a self-defining quality that our national culture has assumed, as consumers are permitted to choose more and more of whatever it is they say, through their previous choices, that they want, rather than being restricted to a more controlled diet of what it is that they or society -- in the estimation of that particular critic -- needs. See, e.g. "Television: In Mounting a Campaign Against Violence, Is the Cable Industry Practicing What it Preaches?" New York Times, March 13, 1995, p. D6; "The Pop Life," New York Times, May 25, 1994, p. C17 ("Time Warner ... came under fire from its stockholders, 60 members of Congress and police and citizens' groups, all of whom objected to the Body Count song 'Cop Killer'"); "Rapper Ice-T ... has brought Time Warner plenty of criticism along with the profits," Washington Times, March 29, 1995, p. A2 (photo caption).

C. A Policy Of Maximizing Diversity For Its Own Sake Would Harm Fundamental First Amendment Interests.

CBS believes that where an intellectual market would be genuinely diverse without government intervention, it is inappropriate for the government to impose ownership rules or other structural limitations in the name of achieving some still-higher, "optimal" level of diversity. We submit that it is no more the proper role of our government to decide what level of diversity is optimal -- i.e., to decree the number and size of press organizations -- than to supervise any other aspect of public debate. Whether large press organizations thrive, or whether small newcomers challenge them successfully and capture significant market share, is a matter that should be determined by the intellectual marketplace itself, rather than by government intervention. The issues raised in the instant proceeding are in this sense analogous to those before the Commission in the proceedings which culminated in repeal of the fairness doctrine. Just as the Commission there recognized that there was no need, and therefore no longer any justification, for it to supervise public debate by regulating broadcast content, the Commission here confronts the same issue with respect to the regulation of broadcast structure, to the extent it considers non-economic diversity concerns as a distinct rationale for such regulation.

Advocates of maximum diversification look beyond mere competition, intellectual or economic, and call for absolute limits on the size of each competing press organization, no matter how vigorously they may compete. An inherent tension arises, however, between the goals of maximizing press diversity on one hand, and maintaining a strong and vigorous press on the other. A policy of artificially diffusing press power over numerous small organizations may increase the number of gatekeepers, but it also artificially diminishes the capacity of the press to perform its primary reporting function as the watchdog over government and society's other powerful institutions. Good reporting requires significant resources, and government intervention to inflate ownership diversity at the expense of efficient business organization inevitably depresses the total resources that can be devoted by the broadcast press to statewide, regional and national newsgathering -- resources more likely to be available to large group owners than to small group or single-station owners. In addition, many of the ideas that contend for attention in the political arena may be fiercely opposed by powerful leaders of government or the private sector, and a press organization's reporting on the progress of such ideas may bring it into direct conflict with either or both. In an age when other institutions, both governmental and private, have grown large and immensely powerful, the government's authority to impose structural rules needlessly limiting the size and resources of broadcast press organizations is necessarily questionable.

This is true no less for local markets than for the national news market. Indeed, the greatest reporting risks tend to exist when a local news organization levels charges against a powerful local institution; in this regard, local markets that lack news organizations backed by extensive resources are at a distinct disadvantage. The resources available to the CBS Owned television stations, for example, permit them to report aggressively, editing news stories by a standard of factual accuracy which seeks to assure that possible lawsuits will be won, rather than that they will never be brought.

CBS believes that far from compromising First Amendment goals, repeal of the ownership rules would significantly advance them, resulting in the formation of station groups with resources to support more and better news coverage than exists today in many markets. And from the perspective of the First Amendment, it would seem no less important than freedom from content supervision that press organizations be permitted to form, join together and disband with no greater interference from the government than the antitrust laws may require.

For the reasons given above, CBS submits that given the past, present and foreseeable state of the "marketplace of ideas" in this country, locally and nationally, the public interest in source, viewpoint or outlet diversity in those markets does not justify structural regulation of broadcasting according to standards different than those utilized to judge economic competitiveness. We turn below to an examination of the competitive circumstances disclosed through the application of those standards.

II. COMPETITION

The Commission suggests a framework for competitive analysis of television broadcasting which begins with its proposals for the definition of relevant product and geographic markets, and then posits choices for measuring market power within them. The Further Notice then discusses each of the rules in light of this analytical framework. The Joint Economic Study provides extensive data and comprehensive responses with respect to all of the economic issues raised in the Further Notice, and we will not reiterate those findings here. To introduce our discussion of the individual rules in these comments, however, we highlight in this section some of our principal conclusions about the Commission's proposed market definitions and its questions as to potential market power.

The Further Notice postulates, and we concur, that broadcast television stations participate in a Delivered Video Programming Market; a National Advertising Market; Local Advertising Markets; and a Video Program Production Market. (¶¶22 et seq.) CBS believes, however, for reasons noted below, that the Commission's proposed product market definitions are unduly restrictive, failing to take account of the wide range of information and entertainment services that consumers can and do turn to in lieu of broadcast television. We also believe that the Further Notice understates the weight that should be accorded to emerging services which will incontestably have the capability to influence behavior, and constrain anticompetitive conduct, by all existing participants in these markets. Nonetheless, assuming the validity of even the unduly restrictive market definitions tentatively proposed in the Further Notice, the national product markets and most of the local product markets in which broadcast television stations compete are characterized by low or moderate levels of concentration. Indeed, as the Commission concluded in its 1984 review of the national ownership rules, "even putting to one side the alternative video and other mass media, it is clear that there is no undue economic concentration for TV alone."[35]

We turn below to a brief overview of each of the markets hypothesized in the Further Notice.

A. The Delivered Video Programming Market.

The Commission has tentatively proposed to describe the market in which broadcast television competes for audiences as one consisting only of the highest penetration in-home video services -- i.e., broadcast television stations (commercial and public) and cable programming. (¶¶29, 30) The Further Notice tentatively concludes that the hypothesized market is local in its the geographic scope. (¶31) The Joint Economic Study examines this limited

[35] Multiple Ownership, supra, 100 FCC 2d at 42.

product market proposed by the Commission, assessing its concentration in each of five of the country's DMAs[36] based on two different calculations of the Herfindahl-Hirschman Index ("HHI") for each DMA. The study first attributes equal audience share to each broadcast television station in the market, adding one additional station to account for all cable programming in the DMA. The study also calculates concentration on the basis of the most recent actual audience shares of each station, with the share of cable viewing based on the combined ratings of cable networks in that DMA. Where equal viewing shares were assumed, concentration of viewership in all five DMAs was found to be low or moderate, with HHIs below (and, in four DMAs, far below) 1800.[37] When actual current viewing shares were attributed in this narrowly defined market, the HHIs were higher, with only two DMAs in the moderate range.[38] Given the protean nature of viewership patterns (as the rise in cable and independent station viewership well illustrates), the fading of the "UHF handicap," and the ability of one station rapidly to capture viewing share if program quality declines on competing stations, CBS believes that the measure of concentration which assumes an equal capacity of

[36] The five DMAs used in the Joint Economic Study were chosen by ranking the DMAs according to population and then dividing them into five groups, each quintile representing 20% of the country's total population. One DMA was chosen to represent each quintile -- in each case a DMA with characteristics close to the median for that quintile. See Joint Economic Study at 14-15.

[37] Joint Economic Study at 16. Under the Department of Justice/Federal Trade Commission Merger Guidelines, HHIs less than 1800 indicate moderate concentration and HHIs below 1000 indicate low concentration. It is important to remember that, while HHIs are a useful analytical tool, they prove nothing about actual or potential anticompetitive behavior. For example, if barriers to entry are low and the likelihood of collusion or unilateral exercise of market power is small, mergers may not be deemed anticompetitive even in a highly concentrated market. See, e.g., id. at 17.

[38] Id. at 16.

stations to attract viewers is the more relevant one. But even if one were to rely, as a measure of viewership concentration, on the HHIs reflecting current actual viewer shares, the likelihood of successful anticompetitive behavior in the hypothesized delivered video program market is remote, given the difficulty stations would have in coordinating and policing a mutual reduction in program quality.[39]

As noted above, we believe that the product market definition proposed in the Further Notice is too narrow, in view of the absence of convincing evidence that non-video media do not compete with broadcast television for audiences.[40] Even if the product market definition is restricted to video services, however, we urge the Commission, at the very least, to evaluate competition in the delivered video programming market based on a realistic assessment of the video services that constrain commercial broadcast television stations. That constraint derives not only from services that large numbers of consumers currently substitute for commercial broadcast television, such as public broadcasting and cable programming, but also from the potential growth of nascent services such as MMDS, SMATV, DBS, TVRO distributors and satellite networks -- growth that has been made possible by new technologies, but would be accelerated if older market participants attempted to engage for a period of time in anticompetitive behavior. To take the most extreme case, even if every broadcast station and cable system in a market were held by a single owner, that owner's policies with respect to program quality and commercial interruption would be forced to take account of the vast

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[39] Id. at 17.

[40] Id. at 12-13.

competitive potential of the emerging services.[41] And lying in wait is the powerful challenge to broadcasting and cable heralded by the enormous financial resources of the regional telephone companies. The potential of the telcos alone is sufficient to assure an explosion of competition in the market for delivered video programming.

Another form of video programming that the Further Notice proposes to exclude from the delivered video programming market (¶30) has already made deep competitive inroads into broadcast television's market share -- i.e., videocassette sales and rentals. We think it clear error to disregard the strength of this provider of in-home video entertainment and information as a disciplining force in this market. VCRs are present in 89% of American television households.[42] In 1994, videocassettes accounted for rental revenues of $9.4 billion and sales revenues of $5.0 billion -- increases of 33% and 122%, respectively, over 1989, and 414% and 1214%, respectively, over 1984.[43] There is no doubt that the public is increasingly looking to videocassettes as an alternative source of much that broadcast and cable television provide. Indeed, within the broadcast industry, videocassette rental is widely perceived as a major factor

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[41] In the last ten years, the number of households subscribing to video programming through SMATV has increased from 400,000 to 1.1 million. Households receiving video programming through backyard dishes increased from 100,000 in 1986 to 2.1 million in 1994. From 1983 to 1989, MMDS households dipped from 500,000 to 100,000. In 1989 MMDS reversed direction, assuming a pattern of steady growth that brought its 1994 subscriber base past its 1983 level to 600,000. Most impressive of all has been the rapid growth in Ku-band DBS. With their compact and relatively inexpensive dish antennas, such DBS services are off to a remarkable start and anticipate enormous growth in the next decade. Over 350,000 households subscribed to DBS by the end of 1994. Two DBS multichannel services, DirecTV and USSB, anticipate 2.5 million to 3.0 million total subscribers by the end of 1996. DirecTV projects 10 million DBS subscribers by 2000. Joint Economic Study at Appendix A, pp. A10-A13.

[42] Id. at Appendix A, p. A-13.

[43] Id. at Appendix A, p. A-14.

in television viewing patterns at particular times, such as weekend evenings, and programming is consciously targeted to recapture (or at least to preventing further defections by) this audience. Videocassette rentals and sales pressure broadcast television to maintain program quality and limit commercial interruption to a tolerable level. The fact that this videocassette programming is carried into the home by hand rather than by wire has surely not prevented it from constraining both broadcast and cable television in the delivered video programming market.

In light of the moderate levels of concentration found even for the restrictive product market defined by the Commission, a broader product definition for the delivered video program market -- one which offered a more realistic picture of the competition for audiences faced by broadcast television stations -- would surely produce findings of low or moderate concentration in virtually all DMAs.

B. The National Advertising Market.

The Further Notice tentatively proposes a national video advertising market encompassing broadcast networks, cable networks, national syndication television and possibly cable MSOs. As the Joint Economic Study indicates, the product market definition proposed by the Further Notice is far too narrow.[44] Among the various other national advertising media which compete in this same market is national television spot, both broadcast and cable. The Further Notice observes that national spot is an imperfect substitute for network and national syndication because it carries high transaction costs and is generally unable to provide an advertiser with simultaneous national exposure in a specific program. (¶37) The customary

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[44] Id. at 20-22.

standard for product market definition, however, is whether a candidate for inclusion would constrain pricing of the other products in the market.[45] It is not necessary that national spot be a close substitute for network advertising for all or even most advertisers in order for this constraint to occur; the fact that many network or syndication advertisers can substitute national spot in many instances is sufficient to justify its inclusion.

Indeed, many other advertising media, both video and non-video, also serve as close substitutes for network and nationally syndicated programming for many advertisers in many instances. In point of fact, the established sellers of national video advertising time are constrained by a host of non-video competitors, such as radio network and national spot, magazines, yellow pages, outdoor advertising and direct mail.[46] It is unreasonable to suppose that national advertisers would accept noncompetitive video pricing before turning to these alternatives.[47]

Appropriately defined, the national advertising market is highly unconcentrated[48] -- so

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[45] Id. at Appendix D.

[46] Id. at Appendix D.

[47] See Joint Economic Study at Appendix III-A. That these media may be substitutable for television advertising is well illustrated by the experience of the cigarette industry. Compelled to rely on newspaper, magazine and outdoor advertising after many years of extensive video advertising, cigarette manufacturers have succeeded in introducing entire product lines and in significantly realigning market shares through aggressive advertising campaigns. For example, the controversial campaign of outdoor and magazine advertising featuring "Joe Camel" is generally credited with sharply increasing Camel's share of domestic cigarette sales -- all without any television advertising of any kind. See also "'Upfront' Study Finds Weakness For Networks," Wall Street Journal, April 2, 1991, p. B-1, cited in OPP Report at 133.

[48] Joint Economic Study at 25-29. The Joint Economic Study calculates an HHI of 134 based on the national revenues of national video (network and syndication), radio, magazines, newspapers, yellow pages, outdoor, direct mail and various miscellaneous forms of advertising.

much so that this product market can be segmented into any number of hypothesized smaller markets and still yield extremely low HHIs.[49] And as in the case of the other markets identified in the Further Notice, the state of competition in the national advertising market can realistically be assessed only by taking account of the new technologies poised to emerge as major competitors in that market. Thus DBS has characteristics strikingly similar to broadcast and cable network television, in that a single transaction may give an advertiser access to every geographic market in the United States. And the advent of telco-based video distribution will assuredly create new national advertising competition.

C. Local Advertising Markets.

The Further Notice proposes a local advertising product market which includes broadcast television stations, cable systems, radio stations and local newspapers. (¶43) The Joint Economic Study provides strong support for the conclusion that this proposed product market is unduly restrictive.[50] Without explanation, the Commission excludes other local advertising media, such as local and regional magazines, yellow pages, outdoor, direct mail and telemarketing. Yet each of the excluded products is as acceptable a substitute for broadcast stations as most or all of the products that the Further Notice includes. Indeed, it is hard to think

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(Based on revenue for national and local advertising sales -- an indication of total capacity -- this same product market has an HHI of 198.) Id. at 28.

[49] Thus, for example, an all-video market definition (i.e., cable and broadcast network and spot plus syndication) has an HHI of 850 (719 based on total revenue). Add radio to national video and the HHI falls to 753 (508 based on total revenue). That same market plus magazines and newspapers yields an HHI of 352 (498 based on total revenues). Id.

[50] Id. at 22-23; Appendix D.

of a single capability of broadcast television that is not shared by at least one medium excluded from the proposed product list. For example, the media embraced by the Commission's proposed definition all offer local advertisers the ability to act on short notice -- advertising a sale, for example, shortly after it is planned and shortly before it is to be held. But direct mail can also serve this function. Video advertising can promote recognition of corporate trademarks and other visual images, but so can magazines, outdoor advertising and direct mail. Broadcast and cable television, radio and newspapers all offer obscure providers of professional services the opportunity to connect with potential clients at the rare moment when those services may be needed. But this category of advertisers -- now a major one for broadcasters -- also relies heavily on the yellow pages.

The Joint Economic Study demonstrates that an appropriately defined local product market is highly unconcentrated in each of five illustrative DMAs.[51] Removing direct mail and miscellaneous advertising from this product market (so that it includes the product list proposed in the Further Notice, plus outdoor and yellow pages) continues to produce low or moderate concentration in all five of these DMAs if based on the capacity measure of all advertsing revenues, and low to moderate concentration in every DMA but one if based only on local advertising revenues.[52]

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[51] Joint Economic Study at 32, Table 5. The DMA is, we believe, the appropriate geographic area for assessing competition faced by broadcast television stations in local advertising markets, since stations are rated according to the size of their audience within their DMAs and such DMA-based ratings are universally used by advertisers as the data bases for their time-buying decisions.

[52] Id. Only if the unduly narrow product market definition proposed in the Notice is adopted are HHIs elevated in the three smaller DMAs. Id.

Moreover, competition in local advertising markets has been intensifying steadily with the emergence of basic cable as a major local advertising medium. Given its huge inventory[53] and its capacity to target audiences, cable clearly has the potential to capture a very sizable portion of local advertising revenues. The special advantages of cable as a local advertising medium were underscored by the Commission staff in its 1991 study of the video marketplace, which observed, for example, that cable enjoys a demographic advantage in that "[c]able subscribers have higher incomes and more education, on average, than the general population, and consume more of many advertised goods and services, making cable subscribers desirable targets for advertisers."[54] Basic cable's share of local television advertising revenues has in fact grown steadily and shows no sign of flattening out. In 1985, local advertising on basic cable accounted for only 2.2% of all local advertising revenues. By 1990 this share had grown to 4.7% and by 1994 to 6.6% -- an increase of 200% over nine years.[55]

The Joint Economic Study observes that collusion in a properly defined local advertising market would be extremely difficult, given the many different factors that bear on the price of

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[53] A typical cable system has enormous inventories of local advertising time to sell. In 1990, 89.3% of cable subscribers received 30 or more channels, and 24% received 54 channels or more. OPP Report at 85, Table 19. Many of these channels are supported in part by local cable advertising.

[54] OPP Report at 131-132, citing Cabletelevision Advertising Bureau, Inc., Cable TV Facts 90, pp. 20-23.

[55] OPP Report at 116, Table 24; Joint Economic Study at 20, Table 3. This sharp growth reflects the growth in cable's penetration. Ninety-seven percent of television homes in the United States are now passed by cable, and 62% of these television homes are cable subscribers, up from 40.3% in 1984. Joint Economic Study at Appendix A, p. A-2.

particular advertising availabilities in a variety of media.[56] If, however, broadcast television stations were viewed as capable of colluding in order to establish anticompetitive prices, cable systems alone would make such collusion unprofitable. And because its potential as a local advertising medium has only begun to be realized, cable serves to constrain broadcast television stations, as well as all other local advertising media, out of proportion to its current share of local advertising revenues.

The declining share of local advertising revenues captured by broadcast television stations is being divided by a significantly larger number of stations. Thus, as the Commission staff observed in its 1991 video marketplace study,

> "Because the number of stations has increased, the growth rate of advertising revenues per station has been lower than that of aggregate station advertising revenues. Dividing television station advertising revenues...by the number of commercial stations shows that advertising revenues per station in fact have fallen in the neighborhood of 4 percent per year in real terms from 1987 on."[57]

Thus, properly defined, or even somewhat narrowly defined, the local advertising markets in which broadcast television stations operate are highly competitive.

D. <u>The National Video Program Production Market</u>.

The Further Notice hypothesizes a market that is national, and perhaps even international, in geographic scope, comprised of the program production companies that make and sell video programming, and of those who purchase video programming, among whom the Further Notice

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[56] Joint Economic Study at 34-36. As noted above, the unlikelihood of collusion may indicate a competitive market even where HHIs are above low to moderate levels.

[57] OPP Report at 128.

proposes to include broadcast television stations, broadcast and cable networks, cable systems, syndicators, LPTV stations and telephone companies. (¶¶46-50)

The Joint Economic Study concludes that there exist both a national market for video programming, in which national exhibition rights are bought and sold, and local video program markets in which local exhibition rights are negotiated.[58] The national video program market is clearly unconcentrated on the demand side. The Study attempts a rough overstatement of concentration in this market by, among other things, treating all of basic cable, all of syndication, all of pay cable and all of home video each as a single purchaser. Based on current expenditures, the resulting HHI is approximately 1500. When these categories are broken out into expenditures by individual firms, the resulting HHI is less than 800. The three original broadcast networks combined have only a 28.1% share of the expenditures in this market.[59]

Because the purchaser population of the video production market is now exploding, we see little projective value in using current expenditures to measure this market. Assessment based on current expenditures cannot adequately take account of the intense competition for programming that has only begun to unfold in the television industry. In broadcast television alone, the emergence of two start-up networks, each currently programming at a fraction of its goal of seven primetime nights per week, guarantees ever-increasing competition among program purchasers.

In the local market for video programming, the Joint Economic Study found low to moderate concentration of video programming purchasers in all but one of its five illustrative

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[58] Joint Economic Study at 39-40.

[59] Id. at 42-43.

DMAs when stations were assigned equal expenditure shares,[60] reflecting the ability of any station to alter its program expenditure strategy. When current viewing shares were used as proxies for station expenditures, concentration exceeding moderate levels was found in all but the largest illustrative DMA.[61] Nonetheless, in view of the difficulties of coordinating a reduction in competition in the area of programming, the study concluded that the exercise of market power by a local video program purchaser was unlikely.[62]

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In sum, the analysis set forth in the Joint Economic Study makes clear that the relevant television markets postulated by the Commission are characterized by robust competition -- whether the narrow market definitions suggested by the Further Notice, or those we believe to be more accurate, are employed. The rigorous competition analysis called for by the Further Notice, therefore, strongly supports the view that the rules at issue in this proceeding should be revisited. We now turn to the implications of this analysis for the Commission's television ownership rules, and offer specific recommendations for their repeal or modification.

III. THE NATIONAL OWNERSHIP RULES

Analysis of every market in which broadcast television stations compete furnishes clear and convincing proof that there is no economic justification for retention of the national

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[60] Joint Economic Study at 44-46. In this calculation all local cable is treated as one additional station.

[61] In this calculation the total program purchases of local cable systems were assigned the viewing share of the DMA's least-watched station. Id.

[62] Joint Economic Study at 46-47.

ownership rules. There is no market, no matter how narrowly or broadly defined, that would be jeopardized in any manner by the repeal of these rules.

The effect of the national ownership rules on local television markets is, by definition, to limit entry by station operators who have proven to be highly effective at serving audience needs. Exclusion from local markets of a sizeable segment of this class of owners -- i.e., those who are good at operating television stations -- cannot help but harm television broadcasting as a whole. As of March 1995, one television station group (Silver King Communications) had reached the present 12 station cap and ten others were within two stations of their limit.[63] Six other groups were crowding the 25 percent cap on a group's aggregate national audience coverage. Indeed, for these six groups, each of which owns VHF stations in both New York and Los Angeles, there effectively exists a twelve percent cap on the coverage of all stations they may own outside those two markets.[64]

When the Commission formally adopted its national ownership rules (the "Seven Station Rule") in 1953, its stated objective was to further its policy of "diversification" and to "implement the Congressional policy against monopoly."[65] In reviewing that decision three decades later, the Commission observed:

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[63] These groups are Clear Channel (10 stations), Gannett Co. (10), Lee Enterprises Inc. (11), New World (11), Perenchio TV (11), Providence Journal (11), Pulitzer Publishing Co. (10), Trinity Broadcasting Network (11), Viacom (10) and Young Broadcasting (10). Joint Economic Study at 76, Table 10.

[64] The six groups that own VHF stations in both New York and Los Angeles are Captial Cities/ABC, CBS, Chris Craft, Fox, NBC and Tribune. All six are within an average of 3.1 percentage points of the 25 percent cap, with none more than 5.5 percentage points away. Joint Economic Study at 76, Table 10.

[65] Amendment of Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 18 FCC 288 (1953).

> "That the Seven Station Rule promotes or is integral to genuine diversity in the expression of viewpoints, and prevents anticompetitive activity, was assumed [by the Commission in 1953], but this assumption was not based on hard evidence in the record."[66]

The Commission concluded in this 1984 review that there was "little possibility that repeal of the rule could cause competitive or diversity harm," and that "licensees should be afforded the opportunity to exploit any possible efficiency from group ownership."[67] At the same time, the Department of Justice concluded that "elimination of the rule [would] pose[] no risk in any market relevant to antitrust analysis,"[68] and the National Telecommunications & Information Administration also advocated immediate repeal of the national multiple ownership rules, observing that both "First Amendment diversity and economic diversity will be protected...."[69] Also cited in the proceeding was the finding of the Commission's Network Inquiry Special Staff that national ownership rules do not protect either competition or diversity.[70]

After its 1984 review of the Seven Station Rule, the Commission concluded that changes in the television marketplace -- both the increase in the number of stations and the emergence of cable -- had rendered the national ownership rules unnecessary.[71] The Commission further found that the rules actually disserved the public by impeding the realization of economies of scale and

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[66] Multiple Ownership, supra, 100 FCC 2d at 24.

[67] Id. at 46.

[68] Reply Comments of DOJ, Gen. Docket No. 83-1009, at 1.

[69] Reply Comments of the NTIA, Gen. Docket 83-1009, at 6.

[70] Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Vol. I at 16-17 (1980).

[71] Multiple Ownership, supra, 100 FCC 2d at 18-20.

other benefits of group ownership. On this basis, the Commission decided to increase the maximum number of jointly owned stations from seven to 12 for a transitional six-year period, after which the rule would "sunset" entirely.[72] On reconsideration, the Commission removed the automatic sunset, but reaffirmed its fundamental conclusion that "the total elimination of a presumptive national ownership rule would benefit the public interest [and] would not contravene our traditional policy objectives of promoting diversity and preventing undue economic concentration."[73] The Commission also established a national audience reach cap of 25 percent of television households, and added special provisions permitting somewhat higher levels of ownership where minority-controlled entities are involved.[74]

As far as it went, the Commission's relaxation of the national ownership rules has clearly posed no detriment to the public interest. And the case for elimination of the national ownership limits now is far more compelling than it was eleven years ago. The marketplace changes identified by the Commission in 1984 have greatly accelerated, further diminishing any conceivable justification for retention of the limits, while increasing the broadcasters' need for relief from gratuitous structural constraints.

In the current proceeding, the Commission proposes either to raise the national ownership cap to as many as 24 stations with a maximum national audience reach of 35%, or eliminate the station cap entirely while increasing the audience reach limitation to 50% in five percent increments every three years. (¶¶100 and 101) CBS believes that this incremental and

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[72] Id.

[73] Multiple Ownership Reconsideration, supra, 100 F.C.C.2d at 97.

[74] Id.

partial relief is too limited. Total repeal of the national ownership rules is fully justified on the economic evidence, would provide important public benefits, and would produce no public detriments.[75]

A. Repeal of the National Ownership Rules Would Not Adversely Affect Competition in Any Market.

The national ownership rules are irrelevant to competition and diversity in markets that are local in geographic scope, including, among those hypothesized by the Commission, the delivered video programming market and the local advertising market.[76] The acquisition of a single television station in Cleveland, for example, does not diminish competition or diversity in any relevant local economic market in Cleveland, regardless of the number of other localities in which the acquiring company may also own stations. In its 1984 review of the multiple

[75] While we see no justification for the retention of any national ownership rule, we would urge that in the event some rule is retained, satellite stations should continue to be exempt from any national ownership restrictions. Under the Commission's licensing policy, a satellite station which rebroadcasts all or most of the programming of a commonly owned parent with which it would otherwise have a prohibited contour overlap will only be authorized where full-service operation would not be economically possible. An applicant for a satellite station license must demonstrate, among other things, that no alternative operator is willing to construct or purchase the station for full-service operation. Report and Order, Television Satellite Stations, 6 FCC Rcd, 4212, 4214-15 (1991). Accordingly, the Commission's policy of exempting satellite stations from multiple ownership restrictions promotes the underlying purpose of these stations -- the extension of service to sparsely populated areas that cannot support full-service stations. To penalize the operation of a satellite with a charge against a group owner's limits under the national rules would defeat the policy of permitting satellite operations by discouraging those group owners close to their ownership limits from providing such service.

[76] See discussion at pp.26-30, 32-35, supra; Further Notice at ¶31; Joint Economic Study at 13-15. To the extent that repeal has any effect at all on competition for audiences in local markets, it will be to increase competition by permitting marginal stations to survive and become more vital through increased operating efficiencies. See discussion at pp. 45-46, infra.

ownership rules, the Commission stressed "the lack of relevance of a national ownership rule to the availability of diverse and independently owned radio and TV voices to individual consumers in their respective local markets."[77]

The national ownership rules are relevant to appropriately defined national markets in which broadcast stations participate. These markets are sufficiently unconcentrated that repeal of the national ownership rules could have minimal impact upon them. For example, as proposed to be defined in the Further Notice, the national video advertising market cannot be affected by repeal of the national ownership rules, since elimination of the rule would have no effect on the number of competitors in this market. As the Commission proposes to define it, this market excludes time sold to national advertisers by individual broadcast stations -- i.e., spot sales. A more realistic defintion of the national advertising market would include national spot sales along with a host of other media, such as national radio networks, magazines and newspapers. The resulting product market is so enormously competitive and diverse as to render rules limiting national ownership completely unnecessary.[78]

With respect to the national market for video programs, it is possible, though highly improbable, that repeal of the national ownership rules would permit the formation of station groups large enough to participate -- i.e., large enough to bid on the national exhibition rights for

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[77] Multiple Ownership, supra, 100 FCC 2d at 19.

[78] Even a national advertising market containing only video media -- i.e., the market as defined in the Further Notice, plus national spot -- yields an HHI, based on national sales revenues, of 850. The HHI for an appropriately defined product market is 134. See Joint Economic Study at 28, Table 4.